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71-1565

No. .....

FILED
MAY 31 1972
MICHAEL RODAK, JR., CLERK

In The Supreme Court of The United States

OCTOBER TERM, 1972

DENNIS RAIMONDI,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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In The Supreme Court of The United States

OCTOBER TERM, 1972

No. .....

DENNIS RAIMONDI,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioner Dennis Raimondi respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals For the First Circuit entered in this proceeding on May 1, 1972.

OPINION BELOW

A written opinion was issued on May 1, 1972, but is not yet reported. A copy of this opinion is attached hereto as Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on May 1, 1972. No petition for rehearing was filed. This petition for certiorari is filed within thirty (30) days of the date of entry of the judgment of the Court of Appeals. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in finding that an affidavit in support of a search warrant, primarily based on hearsay information received from the driver of a truck from which merchandise was stolen, contained sufficient facts for a neutral magistrate to conclude that the informant was reliable?

2. Whether failure of the United States Attorney to disclose evidence favorable to the petitioner until after the government had concluded its case amounts to a violation of due process?

3. Whether allowing a lawyer to invoke the attorney-client privilege and refuse to testify as to the substance of a conversation between his client and another person violated the petitioner's right of confrontation guaranteed by the Sixth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fourth Amendment, United States Constitution:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath and affirmation----"

Fifth Amendment, United States Constitution:

"No person shall ---- be deprived of life, liberty, or property, without due process of law----"

Sixth Amendment, United States Constitution:

"In all criminal prosecutions, the accused shall enjoy the right ---- to be confronted with the witnesses against him----"

The Jencks Act; United States Code, Title 18:

§ 3500 Demands of production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report, in the possession of the United States which was made by a Government witness or prospective Government witness ---- shall be the subject of subject of subpoena, discovery, or inspection until said witness has testified----"

STATEMENT OF THE CASE

The petitioner and five others were charged in a two count federal indictment with stealing goods which were part of an interstate shipment in violation of 18 U.S.C. §§ 659 and 2; and with conspiring to steal goods which were part of an inter-

state shipment in violation of 18 U.S.C. § 371 (RI 12-20)*.

The petitioner filed various pre-trial motions, one of these being a motion to be furnished with exculpatory evidence. A copy of this motion is attached hereto as Appendix B. The trial judge denied this motion, "on representation of the United States Attorney that he is in compliance with *Brady* v. *Maryland*, 373 U.S. 83 (1963)". A copy of the judge's opinion and order is attached hereto as Appendix C.

Upon motion of the United States, the trial of the defendant Edgar McDonald was severed and the remaining defendants were tried before a jury in the United States District Court for the District of Rhode Island (RI 5). The petitioner was found guilty of the conspiracy count only and sentenced to imprisonment for a period of four years and ordered to pay a fine of $10,000 (RI 7, 9-10).

During the trial, Special Agent Martin Conley testified that pursuant to a search warrant, he had searched the premises located at 99 Tell Street, Providence, Rhode Island (RII 1-14). Before the fruits of this search were introduced, upon the motions of the petitioner and the other defendants, a voir dire was held to determine the admissibility of this evidence (RII 13-22). Agent Conley testified that he had applied for five separate warrants to search the building and out-building located at 99 Tell Street and that he had used the same affidavit in support of each application. He then testified substantially as to what was recited in the affidavits (RII 24, 30-50). After having considered this testimony and the actual affidavit, the trial judge ruled that the search was

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* Reference is to the appendix which was before the Court of Appeals.

legal and permitted the Government to go forward. A copy of this affidavit is attached hereto as Appendix D.

The Government's case was completely dependent upon the testimony of one Edgar McDonald, a named defendant and co-conspirator, whose trial was severed from that of the other defendants. During the trial, one Andrew Bucci was called to the stand by the petitioner (RII 157). Bucci testified that at one period before the trial, he had represented the witness Edgar McDonald (RII 158-159). Bucci was then asked to relate what McDonald had said to his (McDonald's) father while they were in the corridor of the courthouse (RII 159-170). Counsel for the petitioner made an offer of proof that if Bucci were allowed to answer the question, he would say that Edgar McDonald told his father that the petitioner was not involved with him on the offense (RII 170). Bucci relied on the attorney-client privilege and refused to answer the question and the trial judge refused to require him to answer (RII 159-170).

At an early point in the trial, the trial judge became aware that Alfred Furtado, an alleged co-conspirator who was not named as a defendant, had made certain statements to various law enforcement officers. The judge indicated that the defendants were entitled to see any of those statements which were exculpatory in nature (RII 69-79). No statements were given to the defendants at that time, the United States Attorney having indicated that Furtado was a prospective government witness. Furtado was never called by the government, but was called to the stand by the defendants. At this time, the written statements were turned over to the defense counsels (RII 136-137). These documents indicated that Furtado had, on various occasions, stated that

only he, McDonald, and two other unknown men had participated in the alleged crime and that he had never conspired with the petitioner.

Upon a motion for a new trial, the petitioner contended that the Government's failure to disclose these statements prior to the time that the witness took the stand was a violation of due process under *Brady* v. *Maryland,* (Supp R. 10-14). The trial judge noted that if the statements were exculpatory, under *Brady* v. *Maryland,* they must be furnished upon request and that this request was made before trial; but that if they were not exculpatory, under the Jencks Act, they need only be disclosed after the witness had taken the stand (Supp R. 15). The judge took this issue under advisement in order to read the statements (Supp R. 16-17). After examination, the judge found that the statements were not exculpatory and denied the motion. A copy of the trial judge's Memorandum is attached hereto as Appendix E.

The petitioner and one other defendant filed timely notices of appeal and raised these issues on appeal. After argument, the Court of Appeals entered judgment affirming the judgment of the district court. A copy of said judgment is attached hereto as Appendix F.

REASONS FOR GRANTING CERTIORARI

The petitioner contends that the Court of Appeals has decided federal questions contrary to the applicable decisions of this Court.

I. The decision of the Court of Appeals that the affidavit in support of a search warrant contained sufficient facts

for a neutral magistrate to conclude that the informant was reliable is contrary to this Court's decisions in *Aguilar* v. *Texas*, 378 U.S. 108 (1964) and *United States* v. *Harris*, 403 U.S. 573 (1971).

It is well settled law that the affidavit on which a search warrant is issued must show on its face enough to justify the issuance of the search warrant, *Aguilar* v. *Texas*, 378 U.S. 108 (1964); and only the information in the affidavit is relevant in reviewing the magistrate's judicial action in issuing the warrant, *Rosencranz* v. *United States*, 356 F.2d 310 (1st Cir. 1966).

An affidavit in support of a search warrant may be based on hearsay information, as long as there is a substantial basis for crediting the hearsay. *Jones* v. *United States*, 362 U.S. 257 (1960). Where the hearsay information is received from an informant, the affidavit must set forth some of the underlying circumstances from which the magistrate can find that the informant received his information in a reliable way, and some of the underlying circumstances from which the affiant concluded that the informer was reliable. *Aguilar* v. *Texas*, supra; *Spinelli* v. *United States*, 393 U.S. 410 (1969).

The affidavit in the instant case was based entirely upon hearsay information. (See Appendix D). Concededly, the fact that the informant stated that he had been a reluctant party to the alleged theft and had been present at the premises located at 99 Tell Street establishes sufficient circumstances from which the magistrate could conclude that the informant received his information in a reliable way. See *Jones* v. *United States*, *supra*; where the affidavit stated that

the informant had purchased narcotics from the petitioners in their apartment.

In *Jones* however, the affidavit further stated that information previously received from the informant had been correct, that the same information had been correct, that the same information had been received from other sources, and that the petitioner and his associates were known to be drug addicts, thus satisfying the second requirement of setting forth circumstances from which the affiant could conclude that the informant was credible or reliable. Yet, the affidavit in the present case states no underlying circumstances tending to establish the reliability of the informant. Furtado's statement that on December 22, 1970, a truck driven by him was stopped by the Rhode Island police, at best is merely a statement of an existing fact which was already a part of the police record. The affiant could not conclude from this statement alone that the informant was reliable, especially when there is no indication as to the reason the truck was stopped. Moreover, unlike *Jones*, the affidavit contains no statements from any other source tending to corroborate the information supplied by the informant. Compare *United States* v. *Allsenberrie*, 424 F.2d 1209 (7th Cir. 1970) where the affidavit stated not only that the informant had given reliable information in the past, but also that the information given was completely corroborated by a second informer who had given reliable information in the past. In addition, there is no indication in the affidavit that the affiant had ever previously known the informant. "Where the affiant officer does not know the informant it would be impossible for the affiant to vouch as to the informer's reliability." *McCreary* v. *Sigler*, 406 F.2d 1264 (8th Cir.) cert. denied 395 U.S. 984 (1969).

Although the hearsay information may be inadequate to satisfy the two-prong test established by Aguiler, this information may be corroborated by independent police investigation or by the affiant's own personal knowledge, so that taken together, reliability may be established. *Spinelli* v. *United States, supra.* The present affidavit discloses no corroborating facts from which the affiant could conclude that the informer was reliable. Moreover, the affidavit is in no way based on the personal knowledge of the affiant, nor does it disclose anything which was obtained through the affiant's own personal observation or investigation. The affiant's mere observation of the building in which the goods were allegedly stored is insufficient corroboration to cure the defective affidavit. *Spinelli* v. *United States, supra.*

In *United States* v. *Harris,* 403 U.S. 573 (1971), the affidavit stated that an unnamed informant had purchased illicit whiskey from within the residence described for a period of two years and recently within the past two weeks. It stated that this person has seen the defendant take illicit whiskey from this residence. It also stated that the affiant had received other information as to the activities of the defendant and that the defendant had a reputation with the affiant for over four years as being a trafficker of illicit liquor. This Court held that the hearsay information coupled with the corroborating statements of the affiant afforded a basis upon which a magistrate could reasonably issue a search warrant. This Court placed substantial weight on the fact that the informant was admitting his lengthy participation in criminal activity, stating that such admissions without more would furnish probable cause.

In the instant case, the affidavit contained no corrobo-

rating information. In addition, the situation is decidedly different from that found in *Harris*. The informant never alleged participation in the crime, nor did he ever confess his guilt. The holding in Harris that admission of criminal activity over a long period of time furnishes probable cause, is not applicable here. The Court of Appeals has mis-applied the rationale of the Harris decision. The affidavit does not satisfy *Aguilar's* two-prong test, and thus does not allege sufficient facts from which an independent magistrate could find probable cause. Admitting the fruits of this search into evidence was a violation of the Fourth Amendment to the United States Constitution. *Mapp* v. *Ohio*, 367 U.S. 643 (1961).

II. The decision of the Court of Appeals that the United State's Attorney's failure to disclose evidence favorable to the petitioner until after the government had concluded its case in no way prejudiced the petitioner is contrary to the applicable decisions of this Court.

In *Brady* v. *Maryland*, 373 U.S. 83 (1963), this Court held that the suppression by the prosecution of evidence favorable to an accused upon request violates due process irregardless of the good or bad faith of the prosecution.

In the instant case, the petitioner filed a pre-trial motion to be furnished with any favorable evidence. This motion was denied upon the representation of the United States Attorney that he was in compliance with *Brady*. At the time there existed certain statements of Alfred Furtado, a named co-conspirator, which established that only Furtado, McDonald and two other unknown persons had participated in the alleged crime. Because seven defendants had been in-

dicted, these statements were very material, since they indicated that certain defendants were not present at the scene of the crime. Because Furtado was a prospective government witness, the government did not disclose any statements until Furtado was called as a witness by the defendants. 18 U.S.C. § 3500. These statements were not disclosed when at the time they were requested.

The Court of Appeals found that the favorable nature of the statements was conjectural, but based its decision on the fact that the delay in disclosure in no way prejudiced the petitioner, especially since Furtado testified at trial.

A United States District Court, in *United States* v. *Ahmad*, 329 F.Supp. 292 (M.D.Pa. 1971) has recently stated:

> It is the duty of the prosecutor to disclose exculpatory material which might not be evidentiary itself but which might provide leads to other evidence. It is his further duty to disclose such evidence which is "merely impeaching" of government witnesses. It is also the prosecutor's duty to use due diligence in obtaining from other government agencies such exculpatory evidence, for negligent non-disclosure violated due process. . . . At least, exculpatory information having a material bearing on defense preparation *should be disclosed well in advance of trial* (emphasis supplied) . . . especially if such information is not Jencks Act material.

Being furnished with any evidence tending to be favorable to a defendant is important because of its effect on pre-trial preparation. *Giles* v. *Maryland*, 386 U.S. 66, 98 (1967); especially when defense counsel is the only person who can realis-

tically measure the relevancy of any evidence to the defense.

That the degree of prejudice should be the criteria in deciding whether there has been a due process violation is contrary to the rationale of the Court's decisions in *Brady* v. *Maryland, supra,* and *Giles* v. *Maryland, supra.* In *Giles,* this Court never explicitly answered the question of whether the prosecution's constitutional duty to disclose extends to *all* evidence admissible and useful to the defendant, and the degree of prejudice which must be shown to make necessary a new trial. *Giles* v. *Maryland, supra* at 74. This question should be now re-examined.

III. The decision of the Court of Appeals that a lawyer can invoke the attorney-client privilege and refuse to testify as to the substance of a conversation between his client and another person violated the petitioner's right of confrontation.

The Sixth Amendment to the United States Constitution guarantees to any accused the right to confront the witnesses against him. It is axiomatic that incidental to this right is the right to call witnesses in order to impeach the credibility of adverse witnesses.

In order for the attorney-client privilege to be invoked, the communication must have been one between the attorney and the client and it must have been made in confidence. *Bauschor* v. *United States,* 316 F.2d 451 (8th Cir. 1963). One of the circumstances by which it is commonly apparent that the communication is not confidential is the presence of a third person who is not the agent of either the client or the attorney. *Cafritz* v. *Koslow,* 167 F.2d 745 (D.C. Cir. 1948);

Wirtz v. *Fowler*, 372 F.2d 315 (5th Cir. 1966). It follows that communications to the third person in the presence of the attorney are not within the privilege. *Himmelfarb* v. *United States*, 175 F.2d 924 (9th Cir.), *cert. denied* 338 U.S. 860 (1949). Moreover, this privilege belongs to the client not to the attorney. *United States* v. *United Shoe Mach. Corp.*, 89 F.Supp. 357 (D.Mass. 1950).

Allowing the witness to erroneously invoke this privilege was highly prejudicial to the petitioner, since counsel made an offer of proof that the witness would have testified that McDonald stated that the petitioner was not involved in the criminal undertaking. The Government's case was based entirely on the testimony of McDonald, so that anything which would have impeached his credibility was highly material and competent evidence. This statement would have severely impeached his credibility and its exclusion constituted constitutional error.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the First Circuit.

Respectfully submitted,

ALFRED PAUL FARESE
Attorney for Petitioner,
Raimondi

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 71-1355

UNITED STATES OF AMERICA,

APPELLEE,

v.

THADDEUS BIGOS,

DEFENDANT, APPELLANT.

No. 71-1356

UNITED STATES OF AMERICA,

APPELLEE,

v.

DENNIS RAIMONDI,

DEFENDANT, APPELLANT.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

Joseph C. Delcore and *Anthony W. DiCecca*, with whom *Alfred Paul Fares* was on brief, for appellants.

Frederick W. Read, III, Attorney, Department of Justice, with whom *Lincoln C. Almond*, United States Attorney, and *Sidney M. Glazer*, Attorney, Department of Justice, were on brief, for appellee.

May 1, 1972

McENTEE, *Circuit Judge*. On the night of January 4, 1971, a truck belonging to Merit Dress Delivery Co., Inc. and traveling between Fall River, Massachusetts, and Madison, Connecticut, was hijacked in Providence, Rhode Island.

Defendants Raimondi, Bigos, McDonald and four others were indicted for hijacking the truck (Count I) and for conspiracy to do the same (Count II).[1] McDonald's trial was severed. Bigos and the four others were convicted on both counts and Raimondi was convicted on the conspiracy count alone. Only Bigos and Raimondi are before us here.

The trial transcript is voluminous and we relate only those facts necessary for the resolution of these appeals. The government's principal witness was the co-conspirator McDonald. In addition to relating the details of the January 4 hijacking, he testified that the defendants met several times between July 1970 and January 1971 to plan the crime and that they intended to take a truck on December 22, 1970, but their plan was aborted when they were stopped by the Rhode Island State Police for a routine check.

On January 8, four days after the hijacking, the F.B.I. conducted a search of the property at 99 Tell Street, Providence, Rhode Island, and discovered the stolen clothing and piece goods. Five separate warrants, each designating a distinct portion of the Tell Street property,[2] were simultaneously issued on the basis of a single affidavit. The defendants contend that the warrants were issued without probable cause and that if probable cause existed at all, it existed only for a search of the first floor apartment. Thus they argue that the issuance of five warrants is equivalent to an impermissibly general search warrant. The affidavit in support of the warrants is based principally on information given by the driver of the hijacked truck.[3] Applying the

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[1] Count I charged violation of 18 U.S.C. §§ 2 and 659 (1970). Count II charged violation of 18 U.S.C. § 371 (1970).

[2] The five warrants designated the following areas: (1) the basement, (2) the first floor, (3) the second floor, (4) the third floor, and (5) the yard and out-buildings.

[3] The affidavit provides in relevant part as follows:

"I, MARTIN P. CONLEY, a Special Agent for the Federal Bureau of Investigation, upon oath, make affidavit and say:

two-pronged test of *Aguilar* v. *Texas*, 378 U.S. 108 (1964), we find that the instant affidavit contains sufficient facts for a neutral magistrate to conclude both that the informant, Furtado, was credible and that he obtained his information in a reliable manner. With respect to the substance of Furtado's story, the fact that he was an eye-witness to the unloading of the truck is sufficient. There is also evidence of his credibility. Initially we note that we are dealing not with a "faceless informer," *Jones* v. *United States*, 362

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(1) That in the course of my official duties I have investigated the theft from interstate shipment of a truck, owned by Merit Dress Delivery Co., Inc., ...

(2) I have personally interviewed the driver of said truck, Alfred Furtado, of 1152 West Main Road, Portsmouth, R.I., who stated to me that on the evening of January 4, 1971, he drove said truck from New Bedford, Massachusetts, enroute to Madison, Connecticut, via Interstate Routes 195 and 95, and that while enroute, on Route 95 in Providence, a blue Chevrolet automobile, which he recognized as belonging to Edgar McDonald, a mechanic at the Merit Dress Delivery Co., Inc. terminal in Fall River, Massachusetts, who was known to Furtado, pulled in front of said truck and forced it to stop. The said McDonald, by threats, forced Furtado to exchange places with him and to follow the truck now driven by McDonald, in McDonald's car, to a three-story wooden building on Federal Hill in Providence, R.I., where two unknown men assisted McDonald in transferring part of the load of said truck through a first floor kitchen window. Furtado stated to me that he saw women's pantsuits and children's dresses, among other items, transferred from his truck into said building at this time. Furtado was then instructed to drive the truck and to follow McDonald's car to a rural location about 25 minutes away from said wooden building where the truck was abandoned by him on instructions of McDonald.

(3) While at the wooden building, one of the unknown men stated, substantially, that his sister lived 'upstairs.'

(4) On January 8, 1971, Furtado was driven to Federal Hill by your affiant and after viewing the area identified the building at 99 Tell Street, Providence, as the place into which part of the load of his truck was transferred on January 4, 1971.

(5) On the evening of January 7, 1971, McDonald told Furtado at said terminal in Fall River that the goods would be removed from the premises 'next week.'

(6) Furtado further stated that on December 22, 1970, McDonald made an attempt to steal a truck then driven by Furtado, but that such attempt was foiled when the truck was stopped by the Rhode Island State Police. I have made independent inquiry and have confirmed that said Police did in fact stop such truck on such date.

. . . . .

(10) Based upon my investigation, I have reason to believe and do so believe that the said clothing and textile material referred to in Appendix A is presently located upon the premises located at 99 Tell Sreet, Providence ,R.I.''

U.S. 257, 273 (1960) (Justice Douglas dissenting), but with a named individual who drove the hijacked truck. Part of his story was corroborated, and whether one views him as an innocent victim or a culpable participant, common sense dicates that there is sufficient reason to credit his identification of the Tell Street property. *See United States* v. *Ventresca,* 380 U.S. 102, 108-109 (1965); *see also United States* v. *Harris,* 403 U.S. 573, 583 (1971) (Opinion of Chief Justice Burger, concurred in by Justices Black, White, and Blackmun). Since Furtado saw the goods going into the first floor apartment, there was probable cause to search at least that area.

Defendants' attack on the five warrants requires little discussion. We do not equate the issuance of five separate warrants with a single warrant for the entire property. Each warrant required an independent determination of probable cause, and that there may not have been probable cause to issue a warrant for some other portion of the property does not necessarily infect the validity of another warrant properly issued on the basis of the same information. Since only the search of the first floor proved fruitful, the defendants were not prejudiced by the search of the rest of the property and we need not determine whether there was probable cause for the other warrants.

The defendants argue that they were prejudiced by the government's nondisclosure of statements made by Furtado to the police and to the grand jury. The district court denied a pre-trial motion for the production of evidence favorable to the defense on the basis of the United States Attorney's representation that he was in compliance with *Brady* v. *Maryland,* 373 U.S. 83 (1963). At trial the government successfully resisted disclosing Furtado's statements on the ground that since he was a potential prosecution witness,

under the Jencks Act, 18 U.S.C. § 3500 (1970), such disclosure was not required until he had testified. However, Furtado was not called by the prosecution. At the close of the government's case, his statements, including grand jury testimony, were made available to the defendants. Had the defense been prejudiced by this use of the Jencks Act to delay complying with the mandate of *Brady* v. *Maryland* until the last possible moment, we would indeed be faced with a difficult issue. However, the district court examined Furtado's statements and found that they were not exculpatory. While the favorable nature of these statements is at best highly conjectural, we prefer to rely on the fact that the delay in their disclosure in no way prejudiced the defendants. *See United States* v. *De Leo*, 422 F.2d 487, 498-499 (1st Cir.), *cert. denied*, 397 U.S. 1037 (1970); see also *United States* v. *Sharpe*, — F.2d —, No. 71-1219 (1st Cir. Dec. 27, 1971). The substance of Furtado's statements was contained in Agent Conley's affidavit in support of his application for the search warrants. See note 3 *supra*. Since the defendants were fully apprised of the substance of these remarks and who made them, their preparation for trial was not impeded. Nor were the defendants hampered thereby at trial. The cross-examination of McDonald exceeds 500 pages and the suppressed statements suggest no conceivable line of questioning which had not already been thoroughly exhausted. In fact, once the defense received Furtado's statements, it made no effort to recall McDonald for further cross-examination. Finally, when Furtado was called by the defense, he repeated almost verbatim his testimony before the grand jury.

Defendant Bigos contends that the court committed error in allowing the jury to consider against him McDonald's testimony that after he, McDonald, went before the grand

jury, he was threatened by Raimondi.[4] Bigos argues that since the conspiracy had terminated at the time this threat was made, this testimony was admissible only against Raimondi. *See Grunewald* v. *United States*, 353 U.S. 391 (1957); *Lutwak* v. *United States*, 344 U.S. 604 (1953); *Krulewitch* v. *United States*, 336 U.S. 440 (1949). In *Grunewald* the Supreme Court found the record inadequate to support the view that there was an actual agreement to conceal, and it refused to imply one. The instant case is distinguishable from *Grunewald*, however, because here there was substantial real evidence that the original conspiracy included an explicit agreement to conceal the true facts of the hijacking. The plan to have Furtado give the police a phony story was neither subsequent nor subsidiary to the conspiracy. *Cf. Grunewald* v. *United States, supra.* McDonald testified that the conspirators agreed before the hijacking that Furtado was to tell a phony story, and he further stated that Raimondi called him on the day he was arrested offering $500 to induce Furtado to stick with the original story. The record also contains two affidavits signed by McDonald at the request of Raimondi and other defendants which can be construed as attempts to bolster Furtado's original account and to exonerate Raimondi, Bigos, and the others. On this record, we agree with the district court that Raimondi's threat was admissible against all the defendants as an act calculated to induce McDonald to stick with the original conspiracy. We note that it might have been preferable to charge the jury to limit its consideration of the threat to Raimondi alone unless it found that

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[4] "When I went to the Grand Jury I came back that night. I received a telephone call from [one of the codefendants] asking me if I went to the Grand Jury. I told him 'No.' He said, 'Well, there was a young girl on the Grand Jury who told her boy friend and he went up and tell Danny.' So I said, 'I didn't go.' And he said, 'Well, we all go through this once in a while.' I said, 'Yes, but I didn't go.' Then he hangs up. Then I got a call back when [another codefendant] was sitting in the kitchen and Danny Raimondi said, 'God help you and your children if you testified in the Grand Jury.' "

Bigos conspired to have Furtado give a false account to the police. The district court, however, gave instructions on termination[5] and the charge was otherwise more than adequate. In the absence of an objection to the charge or a request for a more specific instruction, we cannot say that the district court erred.

Finally, defendant Raimondi contends that it was improper to allow McDonald's former attorney to invoke the attorney-client privilege with respect to a statement made by McDonald exculpating Raimondi. His principal argument is that the presence of McDonald's father when the statement was made, vitiated the privilege. While we agree that the presence of a third party commonly destroys the privilege, it does so only insofar as it is indicative of the intent of the parties that their communication not be confidential. We have reviewed the record carefully, and in view of the witness's testimony we cannot say that the district court abused its discretion in permitting the attorney to invoke the privilege. Furthermore, since McDonald's affidavit, which contained a statement almost identical to the excluded testimony, was already before the jury, we cannot see that Raimondi was materially prejudiced by its exclusion.

Affirmed.

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[5] The termination of a conspiracy is usually an issue to be determined on the facts of the individual case, *United States* v. *Sarno*, ... F.2d ....., No. 71-1226 (1st Cir. March 6, 1972), and is properly a jury question. The court's charge that "[S]tatements of any conspirator, which are not in furtherance of the conspiracy, or made before its existence, or after its termination, may be considered as evidence only against the person making them" was sufficient in the absence of a request for something more specific.

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APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA

VS.

DENNIS RAIMONDI, alias
John Doe, alias Danny
Raimondi, alias Dennis
Lytwyn, alias Dennis Lytvyn

Cr. no. 7718

MOTION TO BE FURNISHED WITH EVIDENCE FAVORABLE TO THE ACCUSED

Now comes the defendant in the above numbered indictment and moves this Honorable Court to direct the Government to furnish the defendant with all evidence which is of an exculpatory nature, or which may be favorable to the accused, which is within the possession, custody and control of or within the knowledge of the United States Attorney during the pendency of all matters relating to the indictment. Such evidence includes but is not limited to (1) any evidence that can be used for thepurpose of impeaching the credibility of witnesses that the Government intends to rely upon in support of the matters referred to in the indictment, (2) statements which would reasonably tend to show that the accused did not commit the offense charged, (3) evidence which would reasonably tend to show that the accused did not commit the offense charged, (4) statements which are inconsistent with statements made by parties other than the declarant, (5) inconsistent statements made by a declarant to law enforcement officers, and (6) prior inconsistent statements from those testified to during the course of the trial.

By his attorney,

ALFRED PAUL FARESE

Everett, Mass.

I hereby certify that a copy of the within motion was this day delivered to the United States Attorney.

ALFRED PAUL FARESE

APPENDIX C

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA	)	
	)	
v.	)	Indictment No. 7718
	)	
DENNIS RAIMONDI, et al.	)	

MEMORANDUM OPINION AND ORDER

May 5, 1971

PETTINE, District Judge. The defendants have filed a number of pre-trial motions which this court will consider as grouped hereinafter adopting the Government's suggestion, since it presents a ready summary in organized form and affords ease of identification as to each ruling by this court.

Schedule of Motions

I.

Matters Relating to the Indictment

	Raimondi	Bigos	Pari and DiCarlo
1. Motion to Strike Alias	X	X	
2. Motion for Bill of Particulars	X	X	X
3. Motion for Severance of Counts	X	X	

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			X
		X	X
	X	X	X
...ation			
	X		X
...atements			
...ning Identifi-			
...ion	X	X	

IV.

Miscellaneous Matters

	Raimondi	Biggs	Parl and DiCarlo
23. Motion for Disclosure of Electronic Surveillance			X
24. Motion for Inventory of Seized Property			X
25. Motion for Evidence Favorable to Accused	X	X	X
26. Motion to Sequester Government Witnesses	X	X	
27. Motion for Leave to File Additional Motions	X	X	
28. Motion for View	X		
29. Motion for Voir Dire of Government's Opening Statement	X	X	
30. Motion to Leave State	X		
31. Motion for a Hearing	X	X	

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... accept it. Otherwise this Court will
...ctions as it feels are warranted.

...n # 24 -- Pari and DiCarlo -- granted by
...ment.

Motion # 25 -- as to all four defendants -- denied -- on representation of the United States Attorney that he is in compliance with Brady v. Maryland, 373 U.S. 83 (1963).

...as
... mutual
...nse and the Government.

... -- Raimondi and Bigos -- denied --
...ng to the defendants the right to request of the Court

APPENDIX D

AFFIDAVIT

I, MARTIN P. CONLEY, a Special Agent for the Federal Bureau of Investigation, upon oath, make affidavit and say:

(1) That in the course of my official duties I have investigated the theft from interstate shipment of a truck, owned by Merit Dress Delivery Co., Inc., 524 West 36th Street, New York, New York, and more fully described as an International van truck, bearing number 106, and New York State Commercial registration number 130-371, which occurred on January 4, 1971, in Providence, Rhode Island.

(2) I have personnally interviewed the driver of said truck, Alfred Furtado, of 1152 West Main Road, Portsmouth R. I., who stated to me that on the evening of January 4, 1971, he drove said truck from New Bedford, Massachusetts, enroute to Madison, Connecticut, via Interstate Routes 195 and 95, and that while enroute, on Route 95 in Providence, a blue Chevrolet automobile, which he recognized as belonging to Edgar McDonald, a mechanic at the Merit Dress Delivery Co., Inc. terminal in Fall River, Massachusetts, who was known to Furtado, pulled in front of said truck and forced it to stop. The said McDonald, by threats, forced Furtadoto exchange places with him and to follow the truck, now driven by McDonald, in McDonald's car, to a three-story wooden building on Federal Hill in Providence, R. I., where two unknown men assisted McDonald in transferring part of the load of said truck through a first floor kitchen window; Furtado stated to me that he saw women's pantsuits and children's dresses, among other items, transferred from his druck into said building at this time. Furtado was then instructed to drive the truck and to follow McDonald's car to a rural location about 25 minutes away from said Wooden building where the truck was abandoned by him on instructions of McDonald.

(3) While at the wooden building, one of the unknown men stated, substantially, that his sister lived "upstairs."

(4) On January 8, 1971, Furtado was driven to Federal Hill by your affiant and after viewing the area identified the building at 99 Tell Street, Providence, as the place into which part of the load of his truck was transferred on January 4, 1971.

(5) On the evening of January 7, 1971. McDonnld told Furtado at said terminal in Fall River that the goods would be removed from the premises "next week."

(6) Furtado further stated that on December 22, 1970, McDonald made an attempt to steal a truck then driven by Furtado, but that such attempt was foiled when the truck was stopped by the Rhode Island State Police. I have made independent inquiry and have confirmed that said Police did in fact stop such truck on such date.

(7) Said truck, being in interstate commerce, was carrying approximately 4000 items of women's and children's clothing, and other textile materials and goods, in 27 invoiced shipments from various shippers in Massachusetts to various consignees in the New York area, as more fully shown on the copy of the daily delivery record, attached hereto, which shows invoice numbers, shippers, consignees and a general description by type of the load. Said clothing was of various styles, colors, materials, sizes and manufacture. Also included in such shipment were bolts of cloth, piece goods, fronts for dresses, hanger tags and neck tickets and other textile materials, all ow which are more fully described in Appendix A hereof, which is incorporated herein by reference.

(8) Said premises located at 99 Tell Street, Providence, R.I., are taxed in the name of the Estate of Giovannina Rizzo, 375 Jastram Street, Providence, R. I., whose estate was probated in Providence, R. I., on November 28, 1956.

(9) That by her will, the said Giovannina Rizzo specifically devised the property located at 99 Tell Street to Josephine Pari, her daughter, whose address is 375 Jastram Street, Providence, R. I.

(10) Based upon my investigation, I have reason to believe and do so believe that the said clothing and textile material referred to in Appendix A is presently located upon the premises located at 99 Tell Street, Providence R. I.

Martin P. Conley
Special Agent, Federal
Bureau of Investigation

Subscribed and sworn to before me at Providence, Rhode Island, on January 8, 1971.

Edwin B. Tetlow
United States Commissioner

APPENDIX E

INDICTMENT NO. 7718

DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA

v.

DENNIS RAIMONDI, et al.

FILED
DISTRICT OF RHODE ISLAND
AUG 1971
JOHN A. McGUEENEY
CLERK

MEMORANDUM

August 3, 1971

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA	)	
	)	
v.	)	Indictment No. 7718
	)	
DENNIS RAIMONDI, et al.	)	

MEMORANDUM

August 3, 1971

PETTINE, Chief Judge. In keeping with its in-court ruling, the Court has examined all of the statements and records pertaining to one Alfred Furtado as turned over to the undersigned and finds they are not exculpatory in nature of any of the defendants. The motions for new trial as to all defendants are hereby denied. An order reflecting the Court's ruling will be prepared by the United States Attorney for the Court's signature.

/s/ Raymond J. Pettine
Chief Judge

aug 3, 1971

APPENDIX F

United States Court of Appeals
FOR THE FIRST CIRCUIT

No. 71 1356.

UNITED STATES OF AMERICA,
Appellee,

v.

DENNIS RAYMONDI,
Defendant, Appellant.

JUDGMENT

Entered May 1 1972

This cause came on to be heard on appeal from the United States District Court for the District of Rhode Island, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:
/s/ Thos. F. Gallu
Clerk

[cc: Messrs. Delcore and Rossi.]

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1565

DENNIS RAIMONDI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of Rhode Island, petitioner was convicted of having conspired to hijack an interstate shipment (18 U.S.C. 659) in violation of 18 U.S.C. 371. He was sentenced to imprisonment for four years and fined $10,000. The court of appeals affirmed with an opinion (Pet. App. A, pp. 14–20).

1. Petitioner alleges that the search of certain premises at 99 Tell Street, Providence, Rhode Island, which led to the seizure of the goods taken from the hijacked truck, was illegal. Petitioner claims that the affidavit submitted in support of the warrant was

inadequate to establish probable cause to believe that the goods would be found.[1] The court of appeals, after a thorough discussion of the facts and applicable law, correctly rejected this argument (Pet. App. A). We rely on its opinion here.

2. Petitioner claims that reversible error was committed when the prosecutor failed to turn over prior statements and grand jury testimony of the driver of the vehicle that was hijacked. Petitioner alleges that this material, which was turned over when the driver was called as a defense witness, contained exculpatory evidence and should have been made available to him prior to trial. The court of appeals found that while "the favorable nature of these statements is at best highly conjectural" (Pet. App. A, p. 18), the allegedly exculpatory statements were attributed to the driver in the affidavit for the search warrant of which petitioner was aware. Accordingly, the court found (*ibid.*) that the failure to turn over other material, which essentially contained the same information, did not prejudice petitioner. Petitioner does not seriously dispute this finding but asserts that "the degree of prejudice should [not] be the criteria in determining whether there has been a

[1] Petitioner does not allege that the premises searched belonged to him or that he "had an interest in connection with the searched premises that gave rise to a 'reasonable expectation [on his part] of freedom from governmental intrusion' upon those premises." *Combs* v. *United States*, No. 71-517, decided June 26, 1972. Petitioner was not charged with possession and would not have automatic standing. *Jones* v. *United States*, 362 U.S. 257; cf. *Combs* v. *United States*, *supra*. The issue of petitioner's standing was not raised or considered below.

due process violation * * *" (Pet. 12). This argument is without merit. *Giglio* v. *United States*, 405 U.S. 150, 154; *United States* v. *DeLeo*, 422 F. 2d 487, 498–499 (C.A. 1), certiorari denied, 397 U.S. 1037.

3. Petitioner contends that the district court improperly permitted a defense witness, who was an attorney of one McDonald, a principal government witness, to invoke the attorney-client privilege as to a conversation he had with McDonald in the presence of the latter's father. Petitioner claims that the attorney would have testified that McDonald had told him that petitioner was not involved in the hijacking. The court of appeals, after carefully reviewing the record, held that the district court did not abuse its discretion in permitting the attorney to invoke the attorney-client privilege (Pet. App. A, p. 20). In any event, the court of appeals also found that any error committed in sustaining the privilege was harmless because an affidavit of McDonald's stating that petitioner was not involved in the scheme—which contained the same denial as to petitioner's participation sought to be elicited from the attorney—was already before the jury (Tr. III, part 2, pp. 22–23). In these circumstances, the court of appeals correctly held that petitioner "was [not] materially prejudiced" by permitting the attorney to invoke the attorney-client privilege (Pet. App. A, p. 20).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972